



# The Authority is in Substantial Compliance with the Public Records Act

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September 2014

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## INTRODUCTION

### Background

The Chief Executive Officer of the California High-Speed Rail Authority (Authority) directed the Audit Division to conduct a review to determine whether the Authority is in compliance with requirements to provide access to public records produced by the Authority, including requirements of the California Constitution, the California Public Records Act (PRA) and the Authority's guidelines for the public regarding access to public records. Our review has determined that the Authority is substantially in compliance with requirements to provide records to the public upon request. Exceptions to public records requirements are discussed in the body of this report.

### Scope and Methodology

The review examined the Authority's receipt and disposition of requests for public records made from January 2011 through April 2014. The examination included a review of the Authority's log of requests for public records made to the Authority during the review period as well as documents associated with each request maintained by public records staff.

Audit Division staff examined each request received during the period of the review to determine the date requests were received. To the extent possible, we identified when letters of determination were required to be sent to requestors and whether the Authority notified requestors of determinations within statutorily established timeframes. We also examined responses to requests to determine whether the Authority followed requirements for denying requests, whether public records staff offered assistance to requestors to identify records, whether records were provided in requested format, and whether staff provided records promptly. We prepared a schedule containing each request and disposition and compared observations on our schedule to the Authority's PRA log<sup>1</sup> to determine whether public records staff maintained accurate records of requests and whether the Authority has complied with requirements for disclosure of public records.

## PUBLIC RECORDS ACT AUTHORITY

Proposition 59 approved by the voters in 2004 created a constitutional right of access to public records. The California Constitution, Article I, Section 3, provides that the people have a right of access to information concerning the conduct of the people's business and, therefore, to the writings of public officials and public agencies. On June 19, 2013, Governor Jerry Brown issued the following statement in support for the California Public Records Act, Government Code, section 6250 *et seq* (PRA)<sup>2</sup>: "We all agree that Californians have a right to know and should continue to have prompt access to public records and I support enshrining these protections in California's constitution."

The PRA governs procedures for members of the public to request, and public agencies to provide, access to information subject to disclosure under the PRA. Section 6250 of the PRA notes that in enacting the PRA, "the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every individual in this state."<sup>3</sup>

Specifically, the PRA requires public agencies, upon requests for public records, to determine whether requested records are subject to disclosure, to notify requestors of the determination and the reasons for such determination, and to promptly make disclosable records available. Other provisions of the PRA require public agencies to provide reasonable opportunities to the public for inspection of records at

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<sup>1</sup> The Authority maintains on its IT system an electronic log of PRA requests received for each calendar year.

<sup>2</sup> Chapter 3.5, Statutes of 1968 added to the Government Code to provide for the inspection of public records.

<sup>3</sup> Legislative intent and heading "General Provisions" amended by Chapter 575, Statutes of 1970.

agency offices, to assist requestors to focus their requests for records and to provide records in electronic format when requested. Finally, the PRA provides that public agencies may collect fees applicable to reproducing public records.

While the PRA contains provisions specifying release of disclosable records, it also provides that agencies may withhold records under certain circumstances. Section 6254 provides specific exemptions for records that agencies may withhold including, but not limited to, preliminary drafts, notes, or interagency memoranda that are not retained by a public agency in the ordinary course of business; if the public interest in withholding records clearly outweighs the public interest in disclosure; records pertaining to pending litigation to which the public agency is a party; personnel, medical, similar files, disclosure of which would constitute an unwarranted invasion of personal privacy; and, information received in confidence by any state agency. In denying requests for public records, public agencies must justify withholding records by demonstrating that they are exempt under express provisions of the PRA or that, based on the facts of a particular case, the public interest served by nondisclosure clearly outweighs the public interest in disclosing records.

### ANALYSIS

Administration of the Authority's public records program is the responsibility of the Office of Communications. Prior to 2013, other Authority staff had responsibility for the program and did not appear to have procedures for handling PRA requests that were as effective as the current procedures.

Staff of the Office of Communications receives requests for public records, identify the records sought, seek advice of legal staff to determine whether requested records are disclosable, notify requestors of determinations, and forward disclosable records to requestors. Requests and disposition of requests are maintained on a log sorted by the year requests were received. Copies of requests, letters of determination and records provided are maintained on the Authority's IT system.

Table 1 shows the number of requests specifically identified as PRA requests, rather than requests for information about the high-speed rail program from the press or the public, received for each year of our review.

**TABLE 1**

<b>YEAR</b>	<b>NUMBER OF REQUESTS</b>
2011	66
2012	78
2013	119
2014 <sup>4</sup>	35

During our review, we examined each request entered on the Authority's PRA log and documents associated with each request to determine whether the requests were handled by Authority staff in compliance with specific provisions of the PRA as noted below.

#### Section 6253

Section 6253(a) of the PRA specifies that public records are open to inspection at all times during the office hours of a state or local agency and that every person has a right to inspect any public record unless the public record is exempt from disclosure. We found the Authority has provided access for inspection of records when requested.

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<sup>4</sup> We examined requests received by the Authority through April 2014

Section 6253(b) requires that, except for records that are exempt from disclosure, records must be made available promptly upon request and that agencies must provide exact copies of records unless it is impracticable to do so. We found that the Authority generally has provided records promptly and no instances where the Authority did not provide exact copies of records.

Section 6253(b) also provides that public agencies may collect fees for the direct cost of duplication of public records. During our review, we did not identify any instances where the Authority collected fees for duplication of records provided to requestors. However, in some cases the Authority did notify requestors that fees would be required for reproduction of public records.

Section 6253(c) requires public agencies to make and provide to requestors of public records determinations as to whether the records sought are public records<sup>5</sup> under the PRA and are disclosable. Public agencies must notify requestors of their determination within 10 days of receipt of a request but may, under unusual circumstances<sup>6</sup>, extend the time limit for determination for up to 14 days. However, in doing so, the agency must provide written notice of such extension, reasons for the extension, and the date the determination is expected to be provided.

We examined the date requests were received by the Authority and whether requestors were notified of determinations as to whether records were disclosable within the 10-day time frame. We also noted whether the Authority requested extensions for determinations, whether extensions complied with exemption criteria under section 6253(c), whether determination letters specified reasons for the determination and, if determinations were made that disclosable records were requested, whether requestors were notified of an estimated date when records would be made available. Table 2 provides the results of our analysis.

**Table 2**

<b>Year</b>	<b># Requests</b>	<b># Determinations &gt; 10 Days</b>	<b>% &gt; 10 Days</b>	<b>Range of Days Late</b>	<b># 14-Day Extensions</b>	<b>Extensions Comply?</b>	<b>Est. Date For Records?</b>
2011	66	10	15	2-12	6	Yes	Yes
2012	78	34	43	1-56	5	Yes	Yes
2013	119	13	11	1-13	19	Yes	Yes
2014	35	3	8	2-6	3	Yes	Yes

To determine whether the Authority's public records act program is in general compliance with provisions of the PRA, we reviewed the date each request was received and calculated when initial 10-day determinations were due. We noted on our schedule the number of determinations that exceeded the 10-day requirement. As shown in Table 2, the number of determinations exceeding 10 days ranged from three through April of 2014 to 34 for all of 2012. The table also shows the range of days determination letters were late for each year. With the exception of the 34 determination letters sent late in 2012, we do not believe there has been material non-compliance with the requirements of PRA section 6253(c).

We also identified whether any initial determination letters requested 14-day extensions and whether the reasons for those extension requests were in compliance with section 6253(c). It should be noted that we found no instances of Authority staff requesting 14-day extensions to determinations and subsequently exceeding 14 days to issue those determinations. In compliance with section 6253(c), documents in the

<sup>5</sup> As used in the PRA, public records are defined as any writing containing information relating to the conduct of the public's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.

<sup>6</sup> As specified in the PRA, unusual circumstances include the need to search for and collect records; the need to examine a voluminous amount of separate and distinct records demanded in a single request; the need for consultation with another agency having substantial interest in the determination of the request; or the need to compile data, write programming language or a computer program or construct a computer report to extract data.

PRA files indicate that staff requested extensions because requests were for large amounts of records or because staff had to search for records in files or databases.

The PRA authorizes public agencies to deny requests for public records under certain circumstances. Section 6254 provides that public agencies are not required to disclose records such as preliminary drafts, notes or memoranda that are not retained by the agency in the ordinary course of business if the public interest in withholding the records clearly outweighs the public interest in disclosing them. Section 6253(c) requires that in making a determination not to disclose records, the public agency must provide the requestor with the reasons for making such determination. Further, section 6255 emphasizes that agencies must justify withholding records by demonstrating that the requested records are exempt under express provisions of the PRA or that there is, on the facts of the case, a greater public interest in withholding the records than in disclosure. Table 3 illustrates the number of cases where the Authority withheld records. It also includes the number of cases the Authority responded to requestors that there were no records available as requested.

**Table 3**

<b>Year</b>	<b>Requests Denied</b>	<b>No Records Available</b>
2011	2	2
2012	3	10
2013	6	12
2014	3	4
<b>Total</b>	14	28

As the table indicates, there were few cases when the Authority denied requests for public records. For those cases where the Authority made determinations that records were exempt, staff provided requestors with specific reasons for the exemptions, including reasons such as requested records were preliminary drafts, records contained personal information, or the records pertained to litigation and carried attorney-client privilege. Determinations that records would be exempt were made by PRA staff in writing as required by section 6255 and contained the name and title of the person making the determination that records are to be withheld as required by section 6253(d).

Table 3 also indicates that with regard to 28 requests during the period of our review, records were not available. The Authority's public records staff responded in determination letters that requests sought records that do not exist. In some instances, staff made suggestions for alternative records to satisfy the request or that requestors seek information on the Authority's website. It must be noted that the PRA does not require a public agency to create records that do not exist. Section 6253(c)(4) does not change this. As previously noted, the section simply states that the time limit for providing a determination letter may be extended for up to 14 days in the event the public agency needs "to compile data, to write programming language or a computer program, or to construct a computer report to extract data." The section contemplates that data already exists in record form (possibly a large database), but an extra step is required such as compilation or extraction prior to transmission to the requestor.

#### Section 6253.1

Section 6253.1 of the PRA requires that agencies receiving requests to inspect or obtain records must assist the public in making focused and effective requests that reasonably describe the records they seek. We found that during the period of our review, Authority public records staff assisted the public in making focused requests. Files of public records requests indicate that members of the public made at least 20 requests for records that were overly broad or voluminous. Public records staff made recommendations to the requestors to narrow their requests by suggesting alternate timeframes for information or suggesting more specific records that would satisfy the requests. We found no exceptions to section 6253.1

### Section 6253.3

Section 6253.3 of the PRA<sup>7</sup> specifies that a state or local agency may not allow another party to control the disclosure of information that is otherwise subject to disclosure. For much of 2012, the Authority had tasked an employee of one of the Authority's direct consultants to disseminate records pursuant to PRA requests. During our review, we found that in all cases where the consultant employee provided records, he appeared to consult with Authority legal or external affairs staff as to whether requested records were subject to disclosure. Moreover, all determination letters sent to requestors were signed by Authority staff indicating that Authority not consultant staff managed the program for dissemination of public requests and controlled the process for making decisions on the documents provided to requestors. We found no exception to section 6253.3 because the consultant staff was acting as an extension of Authority staff. Since 2013, the Authority has had staff within the Office of Communications dedicated to managing the PRA program and producing records requested under the PRA.

### Reimbursement for reproduction of public records

Section 6253(b) permits state and local agencies to receive reimbursement for the direct costs for duplicating public records requested pursuant to the PRA. Section 6253.9, which requires agencies to make information available in any electronic format in which they hold the requested information, permits agencies, under certain circumstances, to receive reimbursement for the costs of producing a copy of the requested information that already exists in record form, including the cost to construct a record and the cost of programming and computer services necessary to produce the record.

As of the date of this report, the Authority has not received reimbursement for providing any records, whether in paper or electronic form, pursuant to the PRA. In reviewing records associated with PRA requests, we noted that in a few instances the Authority provided information to requestors that there would be a cost associated with providing the requested records. However, we found no cases where requestors agreed to the costs and subsequently sought the requested documents.

### The Authority's draft policy for compliance with the PRA

The Authority's PRA staff has developed a draft policy document that establishes guidelines and general direction for handling PRA requests. The intent of the draft policy is to ensure that the Authority complies with relevant state and federal laws and the Authority's guidelines for handling PRA requests. The policy, which has not yet been approved in its final form, describes the roles and responsibilities of the Office of Communications, the Legal Division, the department in general and the program management team who may become involved in responding to PRA requests. The draft policy establishes a fee of \$.10 per page for records provided in paper form and additional fees for color copies, and audio/video/photo reproduction of information.

While the draft policy appears to be comprehensive in its delineation of the roles and responsibilities for responding to public records requests and its guidelines for production of records, it does not provide guidelines or procedures to Authority staff for requesting and receiving reimbursement for production of records under the PRA. The draft policy could provide more complete guidance regarding how requests for reimbursement should be communicated to requestors. For example, staff could be directed in the policy to notify requestors in determination letters that the requested documents consist of a specific number of pages, that the cost to the requestor totals a specific amount and that the documents will be forwarded upon the Authority's receipt of the required fee. Alternatively, records could be provided to requestors consistent with the determination made in the determination letter and a bill or invoice could be provided for the reimbursement amount. If such a procedure is adopted, a process would need to be

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<sup>7</sup> Section 6253.3 was added by Chapter 62, Statutes of 2008.

established to notify the Accounting Division to create an account receivable for subsequent collection of the reimbursement.

Finally, with regard to the issue of meeting the 10-day requirement for notifying requestors of the Authority's determination as to whether requested records are disclosable as discussed above, the draft policy correctly notes that the holidays may be taken into account when complying with requests. However, the draft policy does not cite any authority for extending the timeframe for production of records when a holiday falls within the 10-day determination period. We believe it would be useful for the policy to note that California Civil Code, section 10 provides that the 10-day timeframe is computed by not counting the first day but counting the last day unless the last day falls on a holiday, and then it is also excluded and production is required the next business day. Such a statement will clarify for the public when they can expect to be notified of the Authority's determination.

## **RECOMMENDATIONS**

### **Recommendation #1**

The Authority should include in the PRA policy document guidelines and procedures for collecting reimbursement from requestors for provision of public records. Specifically, the procedures should state that requestors will either be notified in the determination letter of the cost of reproducing records and that the records will be provided upon the Authority's receipt of the reimbursement amount or that an invoice will be included with the requested records. In the latter case, the procedures should ensure that the Accounting Division is notified of the amount due so that an account receivable can be established.

### **Recommendation #2**

The Authority's policy for complying with PRA requests should include language that clarifies the 10-day time period for the Authority to respond to requests for public records. The policy should note that the California Civil Code establishes how public agencies are to calculate the timeframe for performing actions required under state law and should describe how the Agency computes the 10-day timeframe for issuing letters of determination under sections 10 and 11 of the Civil Code. Such clarification will ensure that requestors are aware that holidays are taken into account when the Authority receives public record requests.

## **STATEMENT REGARDING AUDIT STANDARDS**

We are not able to cite that this review was performed under the International Standards for the Professional Practice of Internal Auditing because the Authority's Audit Division has not undergone a peer review. However that does not impact compliance with other applicable elements of the standards for consulting services. The Authority is not yet eligible to have a peer review due to the recent formation of the Audit Division and the lack of a body of work to be reviewed.





September 8, 2014

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Mr. Tony Majewski  
Senior Management Auditor  
California High-Speed Rail Authority  
770 L Street, Suite 800  
Sacramento, CA 95814

Dear Mr. Majewski:

The California High-Speed Rail Authority's (Authority) Office of Communications has reviewed the Draft Public Records Act (PRA) Audit and agrees with the finding that "the program is substantially in compliance" and provides the following updates and responses regarding the program and recommendations.

We are happy to report, that since the Office of Communications became responsible for the administration of the PRA Program, several steps have been taken to ensure compliance including:

- Hiring a full-time staff member dedicated to the program
- Updating the PRA webpage to include additional guidance to the public on records requests and frequently asked questions
- Drafting a Policy Directive that provides guidelines, direction and procedures for the PRA Program. It also would establish a repayment fee structure for requestors.
- Initiating the development of training for all staff members including contract employees
- Initiating discussions with the Office of Technology to develop a system to better track and administer the program
- Increasing transparency by developing a draft monthly report which shows the receipt and disposition of request for public records

The draft audit report contains two recommendations pertaining to the administration of the PRA Program.

**Recommendation #1:** Include in the PRA Policy Directive guidelines and procedures for collecting reimbursement from requestors.

**Response:** The Authority will develop guidelines and work with Fiscal Services Division on procedures for collecting reimbursements and include in the PRA Policy Directive.

EDMUND G. BROWN JR.  
GOVERNOR



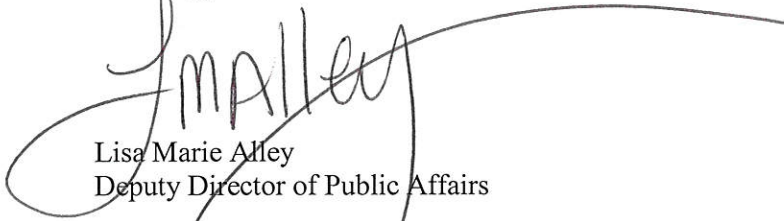
**Recommendation #2:** Include in the PRA Policy Directive language that clarifies the 10-day time period for responding to requests.

**Response:** The Authority will include the California Civil Code that establishes the timeframes.

It is our intent to finalize the Policy Directive by the end of 2014 and implement the training program, monthly reporting and repayment fee structure.

Please contact Maria Hoffman, Public Records Act Staff, at (916) 431-2934 or [marie.hoffman@hsr.ca.gov](mailto:marie.hoffman@hsr.ca.gov) with any questions and or concerns.

Sincerely,

A handwritten signature in dark ink, appearing to read "L. Alley", with a long, sweeping horizontal line extending to the right.

Lisa Marie Alley  
Deputy Director of Public Affairs

CC: Jeff Morales, Chief Executive Officer  
Bob Magnuson, Chief of Communications/External Affairs